Office Supreme Court, U. S.
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CHARLES ELMORE CROPLEY
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 250

THE UNITED STATES OF AMERICA,
Appellant,

vs.

NEW WRINKLE, INC., AND THE KAY & ESS COMPANY

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

MOTION OF THE KAY & ESS COMPANY TO DISMISS

SAMUEL L. FINN,
Counsel for Appellee.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Civil Action No. 1006

Filed August 7, 1951.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

NEW WRINKLE, INC., AND THE KAY & ESS COMPANY,
Defendants

MOTION TO DISMISS PLAINTIFF'S APPEAL

Now comes Defendant The Kay & Ess Company, and moves the Court to dismiss the Government's appeal from the District Court's order dismissing the Complaint against Defendant The Kay & Ess Company, on the grounds that no substantial question is presented thereby.

Memorandum

In the Government's statement of "Questions Presented" on this appeal, it is the Government's position that three questions are presented. An analysis of these questions, in the light of the allegations in the Complaint, makes it clear

that, as to Defendant The Kay & Ess Company, the questions presented are so minimal as not to warrant the attention of the Supreme Court.

Questions No. 1 and 2

The first two questions presented are, in substance, the same question. They revolve around the Plaintiff's allegations that Defendant The Kay & Ess Company and Chadeloid Chemical Company entered into an agreement whereby they created New Wrinkle, Inc. and assigned to New Wrinkle the various patents of Defendant The Kay & Ess Company and Chadeloid. As alleged by the Plaintiff, this agreement was entered into November 2, 1937.

There can be no question but that the above-mentioned agreement of November 2, 1937, and licenses thereafter issued by New Wrinkle, were within the doctrine of *U. S.* v. *General Electric Company*, 272 U. S. 476. The Plaintiff, on page 7 of its petition on appeal, now takes the position that the prohibition against cross-licensing by two patent owners laid down by *U. S.* v. *Line Material Company*, 333 U. S. 287 by inference condemns the organization of New Wrinkle for the purposes alleged.

The specious nature of this argument is made apparent by the Plaintiff's failure to allege ownership by Defendant Kay & Ess of any New Wrinkle stock after November 2, 1937. Whereas, under the *Line Material* case, the two patentees who engaged in the cross-licensing agreement remained owners of the patents involved, there is nothing in the Plaintiff's Complaint to suggest continued ownership by Defendant Kay & Ess of any stock in New Wrinkle, and the Complaint itself discloses a lack of ownership by Defendant Kay & Ess in the patents after their assignment to New Wrinkle.

It is this failure of the Complaint to allege any further ownership by Kay & Ess of New Wrinkle stock after November 2, 1937 which makes the Complaint defective as to Defendant Kay & Ess, and which, it is respectfully submitted, formed the basis for the District Court's dismissal of the Complaint. The first license agreement between New Wrinkle and any of the licensees, as alleged by the Complaint, became effective on or about May 7, 1938, at which time, for all that appears in the Complaint, Defendant Kay & Ess may well have been in the same position as any one of the other approximately two hundred licensees alleged, insofar as any relationship with New Wrinkle was concerned. There is no allegation whatsoever that on or about May 7, 1938, when the alleged license agreements became effective, that Defendant Kay & Ess had any interest in or control of Defendant New Wrinkle.

It is submitted that the fact situation alleged by the Government comes squarely within the approval of the *General Electric* case, and that the later decisions in the *Line Material* case and in *U. S.* v. *U. S. Gypsum Co.*, 333 U. S. 564, 339 U. S. 959, 340 U. S. 76, do not alter the law as applied to Defendant Kay & Ess.

Question No. 3

The Plaintiff contends that the third question presented is "whether the *General Electric* case authorizes a *non-manufacturing* patentee to fix the prices at which its licensees sell." (Plaintiff's italics.) It is respectfully submitted that, insofar as Defendant Kay & Ess is concerned, this third question is not applicable. Defendant Kay & Ess is not a "non-manufacturing patentee", and therefore this appeal raises no question whatsoever, let

alone a substantial question, with respect to Defendant Kay & Ess, insofar as the third question presented is concerned.

Summing up, the most that can be said for the Government's position is that on November 2, 1937, Defendant Kay & Ess and Chadeloid entered into an agreement to organize New Wrinkle and to assign to New Wrinkle all of their patent rights relating to wrinkle finishes, and that New Wrinkle did then license various manufacturers under the patents in question. Basing its contention on a totally unwarranted extension of the doctrine laid down by the *Line Material* case, the Government contends that this agreement was illegal. Further, in the absence of allegations of continued ownership or control of New Wrinkle by Defendant Kay & Ess, the most that can be said about Defendant Kay & Ess is that it became a licensee from New Wrinkle. The Government, in its Complaint, did not consider the relationship of the approximately two hundred other licensees sufficiently substantial to warrant their inclusion as defendants. It is respectfully submitted that this appeal from the District Court's order dismissing the Complaint against Defendant Kay & Ess is no more substantial than the position of the other licensees, and it should, therefore, be dismissed.

Respectfully submitted,

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